No. 14983

United States Court of Appeals

for the Ninth Circuit

THEODORE B. RUSSELL,

Appellant,

vs.

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellees.

THE TEXAS COMPANY, a corporation,

Appellant,

vs.

THEODORE B. RUSSELL,

Appellee.

Reply Brief of Appellant

THEODORE B. RUSSELL

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INTRODUCTORY MATTER

In their brief on file herein counsel for the appellee, Northern Pacific Railway Company, devote considerable argument to the proposition that the proviso of the Joint Resolution of May 31, 1870, Resolution 67, 16 Statutes 378,

Study of the brief filed herein by appellee Railway Company leads us to believe that a concise summary of our position in this case may be of considerable assistance to this Court. That position, as clearly as we can state it, is as follows:

1. That by the Granting Act of 1864 the lands involved in this case were granted to the Railroad Company, the predecessor of the appellee Railway Company and that grant was a grant in praesenti but by that grant the Railroad Company did not receive a complete fee simple title in that the settlement and preemption proviso with which we are concerned, applies only to the "place lands" between Portland and Puget Sound, the grant of which is contained within the Resolution, that it does not apply to the "place lands" acquired by the company under the Act of July 2, 1864, Chapter 217, 13 Statutes 365, and that it does not apply to the indemnity lands acquired by the company under the Resolution or the Act.

It is conceded by all parties that the land here involved is "place land" acquired under the Act of 1864 and we contend under the Resolution of 1870. (See p. 9, Brief of Appellee Railway Co.) For this reason we see no necessity of burdening this Court with argument concering the applicability of the proviso of the Joint Resolution of 1870 to the "indemnity lands" and shall confine our arguments to a consideration of that proviso as it affects the "place lands" acquired by the company.

one of the incidents of an absolute fee, the power to mortgage, was withheld. Further, and incidentally, the grant, while a grant in praesenti, was not a present grant of any specific land.

2. That by the joint resolution of 1870 the railroad was offered a more complete title to the land previously granted removing the limitation contained in the grant of 1864. The grant of 1870 thus being in effect a regrant or new grant to the railroad company applicable to the land previously granted by the Act of 1864.

That the railroad company signified its acceptance of the regrant of a new and more complete title to the lands granted by the Act of 1864 by mortgaging the lands received under the grant of 1864 and that the lands granted by the Act of 1864 thereby became lands "hereby granted" under the Joint Resolution of 1870 and as such subject to the settlement and preemption proviso contained within the Joint Resolution of 1870. That furthermore, both the company and the government have previously recognized the validity of this proposition by virtue of the recitals contained within the place list which constituted the Northern Pacific's selection of the lands here in dispute and in the recitals contained in the patent issued by the government to the Railroad Company, both of which documents are before this Court.

3. That by accepting the Joint Resolution of 1870, as it applied to the lands granted by the Act of 1864 and accept-

ing the regrant of the new and more complete title to th land granted by the Act of 1864 the Railroad Compan created a contract between itself and the United tSate for the benefit of third parties by which it bound itself t dispose of the granted lands as provided in the Resolutio of 1870.

4. That the appellee Railway Company, when it suc ceeded to the rights and privileges of the Railroad Com pany under the Act of 1864 and the Resolution of 187(likewise succeeded to its obligations and duties under tha Act and that Resolution.

5. That the Act of 1864 and the Resolution of 187(were and are laws as well as contracts and the purporte mineral reservation of the appellee Railway Company i this case is against the law as well as being against the con tract.

6. That the reservations, being illegal, are void anc must be treated as if they had never existed and the mineral are conveyed by the deed from the Railway Company t appellant's predecessor.

7. That the Railroad Company and its sucessor, th appellee Railway Company, were bound by the provis ions of the Resolution of 1870 to open for settlement anc preemption, i. e., to offer to sell to qualified purchaser without reservation and at prices no greater than $2.5(an acre to be paid to the company. That the well recognize equitable maxim "that which ought to have been done is t

be regarded as done in favor of him to whom and against him from whom performance is due," operates upon the transaction insofar as possible.

Except for the questions raised by the mortgage foreclosure by which the defendant Railway Company appeared on the scene the foregoing points illustrate the position of the appellant Theordore B. Russell and the basis for his claim to title to the minerals purportedly reserved by the appellee Railway Companay. As we shall demonstrate, the brief of the appellee Railway Company on file herein misconstrues the position and many of the arguments of the appellant anad for that reason much of the argument presented in the brief of the appellee Railway Company is without force.

ARGUMENT

I. Settlement and Preemption Proviso Applies To the Lands Here Involved.

A. Analysis of Land Grant Acts

1. Act of July 2, 1864 (Chapter 217, 13 Statutes 365).

Examining the consideration of the original land grant act commencing upon page 11 of the brief of the appellee Railway Company together with their consideration of that portion of our original brief entitled "Nature and Effective Date of the Original Grant of July 2, 1864" commencing on page 51 of the company's brief, there would seem to be a dispute between the appellant Russell and the appellee Railway Company as to the interpretation of the original

Act of 1864. Analysis of the arguments there presented by counsel for the appellee Railway Company illustrate that there is in fact no such disagreement. Counsel for the appellee Railway Company state, at page 11 of their brief, that title to all the granted lands which were "place lands" which were not otherwise disposed of or settled upon or preempted or mineral in character when the line became definitely fixed vested immediately in the company in praesenti as of July 2, 1864. This proposition we have never disputed and do not now dispute, nor do we dispute the proposition set forth at pages 51 and 52 of the brief of the appellee Railway Company that there was a transfer of present title as of the date of the grant confirmed by issuance of the patents. What we intended to point out in our original brief was that the Act of 1864 was a grant of the "place lands," *in praesenti,* but that it was a limited grant and that certain obligations were placed upon the Railroad Company which it was bound to meet *in order to be entitled to receive patents* to the land and in that the railroad was forbidden to issue any mortgage or create any liens.

Apparently the argument and disagreement on this point arises out of a difference of opinion as to the proper interpretation of the paragraph in the opinion in St. Paul & Pacific R. Co. vs. N. P. R. Co., 11 Sup. Ct. 389, 139 U. S. 1, 35 L. Ed. 77, set forth at page 22 of our original brief, which quotation we set forth again for the convenience of the Court with emphasis which may clarify our arguments based thereon.

"Although the restraint in the Act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that *the Company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each 25 mile section was completed and accepted by the President,* so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the Company's failure to comply with its conditions." (Emphasis supplied).

As we stated in our original brief, the condition concerning which the Supreme Court was speaking in the above quotation is unimportant in this action and we present it solely to illustrate the nature of the title acquired by the Railroad Company by the Act of 1864 without more, that is, without action on the part of the company to perfect its grant. Thus, the apparent disagreement between appellant and the appellee Railway Company upon this point, if it is a disagreement, actually need not be considered.

The limitation which we consider important, and which strangely enough counsel for the appellee Railway Company do not choose to discuss, was the limitation placed upon the grant, the provision of the Granting Act of 1864 forbidding the mortgaging or creation of a lien upon the lands granted which is contained in Section 10 of the Act of 1864. Counsel for the appellee Railway Company do not dispute the statement contained in our original brief that the power

to mortgage is an incident of an absolute fee. For this reason we assume that counsel for the appellee Railway Company would agree with this statement.

In Black's Law Dictionary, p. 761, an absolute or fee simple estate is defined as follows:

> "An absolute or fee-simple estate is one in which the owner is entitled to the entire property, *with unconditional power of disposition* during his life, and descending to his heirs and legal representatives upon his death intestate. Code Ga. 1882, Sec. 2246 (Civ. Code 1910, Sec. 3657). And see Friedman v. Steiner, 107 Ill. 131; Woodberry v. Matherson, 19 Fla. 785; Lyle v. Richards, 9 Serg. & R. (AC) 374; Loventhal v. Home Ins. Co., 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; Dumont v. Dufore, 27 Ind. 267; Alsman v. Walters, 184 Ind. 565, 106 N. E. 879, 880; Veseleka v. Forres (Tex. Civ. App.) 283 S. W. 303, 305; New Cathedral Cemetery v. Browning, 153 Mr. 408, 138 A. 258, 260." (Emphasis supplied).

It is clear that the Railroad Company, being forbidden to mortgage, did not receive the title thus defined. The incidents of title not granted to the Railroad Company must then have remained with the original grantor, the United States.

2. Joint Resolution of May 31, 1870.

Commencing with page 13 of their brief, counsel for the Northern Pacific consider the Joint Resolution. We agree with much that is said in that portion of their argument. We agree that the resolution made an additional and entirely

rw grant of land between Portland and Puget Sound which as not contemplated by the Act of 1864. We do not agree tat these lands between Portland and Puget Sound were the (ly lands embraced within the terminology "hereby grant- e" as used in the Joint Resolution. Neither do we contend tat the settlement and preemption proviso applied to the lnds previously granted by the Act of 1864, except in so fr as the Railroad Company accepted the grant of new title t these lands contained in the Resolution. Our position in tis respect largely destroys the forcefulness of much of the gument advanced by counsel for the Railway Company. he authorities cited and quoted from on pages 16, 17 and 3 are authorities directed to the proposition which we lve never disputed, i. e., that the Resolution made an ad- ctional grant not previously granted. We should point out, bwever, that in the case of Kimes vs. N. P. Ry. Company, 9 Mont. 573, 144 Pac. 156, cited on page 18 of the Railway ompany's brief, the plaintiff was not advancing a claim ased upon the settlement and preemption provision of the oint Resolution of 1870. The case is of little interest to us ere for this reason.

Neither is the legislative history of the Joint Resolution iscussed, commencing with page 19 of the Railway Com- any's brief, as persuasive as counsel for the Railway Com- any contend. Examination of the proceedings in Congress t the places indicated by counsel for the Railway Company evealed that the various amendments to which they refer, hich were defeated, were all amendments seeking to apply

the settlement and preemption proviso to the lands previously granted without reference to the Railroad Company's acceptance or rejection of the re-grant, necessarily made by the provision of the Joint Resolution giving to the Company the power previously withheld to mortgage its grant.

In this connection, it is interesting to note that the settlement and preemption proviso, as first proposed, specifically limited its terms to the additional land granted by the Resolution not included in the lands granted in 1864. The proviso originally proposed by Mr. Wilson read as follows:

> "The *additional alternate* sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding one hundred and sixty acres or quarter section to any one settler at prices not exceeding $2.50 per acre." (Emphasis supplied).

See: Congressional Globe, March 2, 1870, page 1626.

Unfortunately the discussions which took place in committee and between various individual congressmen are not available, but certainly it is reasonable to assume that the change in the proviso, from the wording above set forth, to the form which it finally took, is explained by the fact that specifically limited as it originally was, it could only apply to the lands which were not included within the grant of 1864 whereas the Railroad Company, if it mortgaged its lands, was clearly acquiring, under the Resolution of 1870, an incident of title in the land granted by the Act of 1864 which was not granted by the Act of 1864. No other reason-

able explanation for the change from the specific limitation is readily apparent. That the proviso could have been specifically limited to the lands granted by the resolution which were not included within the Grant of 1864, is illustrated by the language originally employed in the proviso as above set forth. Had the legislators so intended, there would seem to be no reason for the change which we have noted.

Under their 4th sub-title of the title "Analysis of Land Grant Acts" commencing at page 26 of their brief and continuing thereafter to page 35, counsel for the Northern Pacific discussed at great length various authorities which they believe illustrate that the proviso does not apply to "indemnity lands." As we pointed out in our introduction to this brief, such argument has no place in this case. The lands involved are conceded by all counsel to be "place lands." Consequently there is no reason to consider this portion of the Railway Company's brief. The status of the "indemnity lands" under the Act and the Resolution is completely outside the issues involved in this case.

3. Land Grant Case of 1940

U. S. vs. N. P. Ry. Co., 61 S. C. 264, 311 U. S. 317, 85 L. Ed. 210

Commencing at page 35 of their brief, counsel for the Railway Company present a discussion and consideration

of what they refer to as the land grant case of 1940 resulting from an Act of Congress of June 25, 1929. (46 Stat. 41). Counsel for the Railway Company contend that this case disposed of the questions which are here at issue. That this is not so may be demonstrated by a brief consideration of that case.

The contention advanced by the plaintiff Russell in this case was not squarely presented in the case relied upon by counsel for the Railway Company, the land grant case of 1940. The government's position in that case and the position of Mr. Russell in this case are very different. The following excerpt from the government's brief filed in the land grant case illustrates the position taken by the government as to the effect to be given to the Joint Resolution of 1870:

> "It made no segregated grant of land. It changed main line into branch and extended branch line into main line. It granted no separate land subsidy for this. The only grant was one for the whole road from Lake Superior to Puget Sound 'with the * * * grants * * * provided for in its act of incorporation.' This was a unit. To it alone, the proviso applied * * *."

In other words, the government in the Land Grant Case contended that the proviso of the Resolution applied to the place lands granted by the Act of 1864 immediately upon its enactment. We do not agree with that contention. We agree that the Joint Resolution made a new grant not contemplated by the Act of 1864, and we agree with the statement of the Supreme Court which is quoted at page 64 of

the Railway Company's brief, being the third paragraph on said page, as that statement is addressed to the contention advanced by the government in that case.

We have demonstrated, however, that the Grant of 1864 was a limited grant. The Railroad Company's title under that grant was limited in that it could not mortgage or in any way create a lien upon the lands granted by the Act. The Resolution of 1870 was then, in effect, a re-grant of the same land, for it enlarged the Railway Company's title to the land and granted to it a title which it had not theretofore enjoyed. This re-grant or new grant, as to 1864 land, could have been accepted or rejected by the Railroad Company as it saw fit merely by mortgaging or not mortgaging the land. The Railroad Company accepted the re-grant, the new title, and mortgaged the land. But the Congress placed a condition upon the grant made by the Resolution of 1870 and that condition was the proviso regarding preemption and settlement. So they said to the Company—you may mortgage it but if you take advantage of this grant then "all lands hereby granted to said Company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said Company not exceeding two dollars and fifty cents per acre." Having taken advantage of the Resolution and accepted the more complete title offered, the Railroad Company, and its successor the Railway Company, were obligated

to accept this burden as well. They must accept the bitter with the sweet.

Counsel for the appellant Railway Company state in their brief that the opinion in the Land Grant Case is one which is extremely complex, complicated and difficult to read, analyze and understand. We subscribe to this statement without reservation. In fact we seriously doubt that the case even went so far as to overrule the contention advanced by the government. Considering the analysis of the case which is presented by counsel for the Railway Company, we find, commencing on page 42 of their brief, they have set forth that portion of the opinion wherein the Court sets forth certain alleged claims of the government and the treatment thereof by the master. As they point out, the fourth point there set forth involved a dismissal by the master of paragraph XIII of the government's complaint. In order that it may be read and considered in connection with our contention, we set forth here that portion of the Railway Company's quotation from that case which refers specifically to this claim:

> "4. The claim that the company failed to perform its contract by refusing to open lands granted it by the Resolution of 1870 to settlement and pre-emption at $2.50 per acre.
>
> "Section 10 of the Act of 1864 provides that 'no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made

in any way, except by the consent of the Congress of the United States.'

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor. The Resolution empowered the company to issue bonds in aid of construction and equipment, and to 'secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.' The Resolution further provided 'that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre.'

"Paragraph XII of the Bill refers to these provisions of the Joint Resolution and alleges that among the place lands granted there are many million acres the quantity and description of which are known only to the company, or its predecessor, which should have been opened to settlement and preemption whereas they were, subsequent to July 4, 1884, (five years from the date finally fixed for completion of the road), sold at such prices, and on such conditions, as to the company seemed best, and that this was a breach of the company's contract with the United States and defeated the policy of the United States. The master reached the conclusion that the motion to dismiss paragraph XIII should be sustained and the court so ruled.

"The Government insists that the Resolution required the company to hold the lands open for settle-

ment, at the price and in parcels as specified, after five years, whether mortgaged or not; that it failed to do so and sold the lands at higher prices and in larger parcels than the Resolution required, and that its breach of covenant defeats its right to any award. The company contends that the intent of the Resolution was to permit it to mortgage all its property rights; that if, at the expiration of five years from the completion of the road, any of the granted lands were undisposed of, or were not subject to mortgage, those lands were open to preemption; that whether or not the existence of a mortgage prevented settlement of the lands, after five years, there was no duty on the company to dispose of them to settlers; and that the company has not broken any covenant in respect of the lands in question."

After setting forth this issue, and numerous others with which we are not concerned, the Supreme Court, in its opinion said:

> "The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rrulings on other issues may be dispositive of the entire controversy." (61 S. Ct. 272-276.)

Then at a later point in the opinion, we find the statement upon which counsel for the Railway Company largely rely which is as follows:

> "We hold, contrary to the Government's assertion that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. We hold further that the company was

not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands."

If anything could be more uncertain in an opinion then ve have never encountered it. The last statement above quoted seems clearly to relate to precisely the issue as to vhich the opinion previously states the justices were evenly livided, and which was reserved. In view of this fact, and n view of the fact previously pointed out that the argument vhich we advanced was not advanced by the government n the land grant case, it is our feeling that this particular ase should be decided independent of the decision in the and grant case. For us now to attempt to reconcile the con- usion inherent in the opinion in the land grant case and pply that opinion to an argument not presented in the land grant case, could only result in further confusion.

It seems clear to us that a holding for the appellant Rus- ell in this case would not result in the reversal of any de- isions of the Land Department or of the cases referred to by counsel for the Railway Company. As we pointed out, those cases and decisions cited and quoted at pages 27-34 of the Railway Company's brief, are concerned with an issue which is not even remotely involved in this case. The land grant case did not decide the issue here involved. Consequently we see no merit to this contention of counsel for the Railway Company that this Court would have to overrule these decisions or cases in order to find for the appellant.

B. APPELLEE'S ANSWER TO THE ARGUMENTS OF APPELLANT

1: Nature and Effective Date of Original Grant of July 2, 186

The remarks of counsel for the appellee Railway Com pany under the above sub-title are effectively disposed o by our arguments hereinbefore set forth and we see no nee to elaborate upon those arguments.

2: The Joint Resolution of 1870 Constituted a Grant of Ne Title to the "Place Lands" in Montana.

Under this heading, counsel for the appellee Railwa Company state that their arguments previously set fort sufficiently cover the situation. It is therefore unnecessar that we elaboratae upon our discussion of appellee's argu ment, which is hereinbefore set forth.

At this point in their briefs, counsel for the appellee Railway Company takes up the matter, pointed out in our original brief, that the Railway Company in its place list No. 36 recognized the applicability of the provisions of the Resolution of 1870 to the place land in Montana. Counsel for the Railway Company state that the sole purpose of the place lists was to identify the lands to which the Railway Company claimed title, and for which it desired patent, to obtain the land office certificate and ultimately to obtain the patent. Counsel for the Railway Company state that no consideration whatever of the preemption proviso was involved; that there was no reference to the preemption pro-

iso, and point out that plaintiff and appellant admits the ertification of fact by the land office on the place list. That is, Section 23 was within the place limits was surveyed land, and wholly unclaimed by any other person. From these facts, counsel for the appellee Railway Company conclude that the inference that the Railway Company ecognized by its statements in the place list, the applicability of the Joint Resolution of 1870 to the lands granted by the Act of 1864 is not warranted. It is true that the place ist did not specifically refer to the preemption proviso; however, the place list relates to place lands only all located n Montana and all of which were lands within the Grant of 1864. We have contended that the Resolution of 1870 was a grant of new title, something the Railway Company did not have, to the lands previously granted by the Act of 1864 and in its Place List No. 36, the Railway Company recited that it made and filed a list of selections pursuant to the Act of 1864 and the Resolution of 1870. Of course, the arguments in our original brief, in connection with this place list, were directed to the proposition that the Railway Company, appellee herein, succeeded to the obligations and duties of the Railroad Company; however, since counsel for the appellee themselves raised the inference that by the place list appellee recognized the application of the Joint Resolution to the place lands in Montana, we insist that the inference is entirely warranted.

In this respect, we might add that the patent, itself,

from the government to the Railway Company which is before this Court, likewise, in its recitals refers to the Joint Resolution of 1870 and like the place lists it conveyed only place lands located in Montana, originally granted under the Act of 1864. It is, of course, a long standing rule that the recitals of a deed are evidence, against the parties thereto at least, of the facts which they recite. See: 32 C. J. S. Evidence, Section 767 (b), page 688 et seq. This patent reciting that the lands are conveyed pursuant to the Act of 1864 and the Resolution of 1870, there is considerable support for a contention that the appellee Railway Company is itself estopped to deny that it held the land or owned the land pursuant to the provisions of the Joint Resolution and that therefore the preemption proviso of the Resolution is applicable to the lands here involved.

3: By Virtue of the Proviso of the Joint Resolution of 1870, the Purported Mineral Reservation of the Northern Pacific Railway Company Is Void.

It is argued by counsel for the appellee Railway Company that the settlement and preemption proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws with an implied covenant on the part of the Railroad Company to permit such disposition, that plaintiff's predecessors could not complain because they did not meet the requirements of the land laws, that only the United States of America could complain of a failure to permit such set-

tlement and preemption and that no claim or entry was ever filed in the land office by appellant's predecessors. Complete answers to these arguments can be found in the statement from Oregon & C. R. Co. vs. United States, 238 U. S. 293, 35 S. Ct. 908, 59 L. Ed. 1360, as follows:

> "By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the government shall withdraw from sale the granted lands, and the provision would seem to withdraw the lands from the specific operation of the Land Laws, and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred."

When these lands were granted to the Northern Pacific Railway Company, the public land laws were no longer applicable thereto and the arguments by counsel for the Railway Company, based upon the fact that certain things required by the land laws were not done, is completely untenable.

In support of their contention that a refusal to open the lands to settlement is a breach of which only the United States could complain, counsel for the appellee Railway Company cite Ore. & C. R. Co. vs. United States, 238 U. S. 393, 35 S. Ct. 908, 59 L. Ed. 1360. This decision was ex-

amined in our original brief on file herein at pages 27 et. seq., where we pointed out that the proviso of the granting act there involved was a limitation upon the power to sell rather than a mandate to sell. We then point out that the proviso in this case, on the other hand, is a mandate to open the lands to settlement and preemption and that it is such was also recognized by the Supreme Court of the United States in the Land Grant Case when it said:

> "A majority of the Justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire line in 1887, whether the lands were then suject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract."

Commencing at page 60 of their brief, counsel for the appellee Railway Company cite a group of cases including: Railway Co. vs. Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. Ed. 1122; Railroad Co. vs. Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. Ed. 363; Whitney vs. Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906; Lansdale vs. Daniels, 100 U. S. 113, 25 L. Ed. 587; Maddox vs. Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. Ed. 527. The question involved in each of those cases was whether or not the claim of a preemptor or settler under the preemption or homestead laws had attached to the land involved prior to the time

that the particular railroad land grants involved attached. None of these cases involved a claim to land granted to a railroad under the provisions of the granting act, and none of these cases are even remotely in point. Here again counsel for the appellee seem to have completely ignored the fact that, by the granting act, these lands were withdrawn from operation of the land laws. Ore. and C. R. Co. vs. United States, supra, 238 U. S. 233.

Commencing at page 66 of their brief, counsel for the appellee Railway Company present an argument to the effect that the sale of the land to the appellee Railway Company upon foreclosure of the mortgages of the Railroad Company was a disposal of the lands within the meaning of the Joint Resolution of 1870 and that, therefore, the lands could not thereafter be subject to the proviso requiring that they be opened to settlement and preemption. The Congress of the United States apparently didn't agree with such notion when it said:

> "* * * and the passage of this chapter shall not be considered as in any wise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relatitve to the disposition of grants of lands by said grantee, and the right is hereby reserved to the United States at any time, to enact further legislation relative thereto." 43 U. S. C. A. 923.

The above provision is contained in the act providing for the bringing of the action resulting in the land grant case hereinbefore discussed.

The Railway Company, itself, apparently did not agree with its own contention, now advanced, when it entered into the stipulation by which the land grant case was finally settled. In the judgment entered by stipulation of the government and the defendants in that case, United States vs. N. P. Ry. C., 41 Fed. Supp. 289, it is provided:

> "That the plaintiff, United States of America, be and it is hereby awarded judgment against the defendant, Northern Pacific Railway Company, in the sum of $300,000 together with interest thereon at six together with interest thereon at six per cent per annum until paid."

In their argument on page 59 of their brief, counsel for the Railway Company assert that this three hundred thousand dollar judgment was on account of the failure of the Railway Company to sell the lands pursuant to the proviso. How could there be any such damage if the sale to the Railway Company removed the lands from the operation of the proviso. Furthermore, both the Railway Company and the Land Department have recognized that the Railway Company as a successor of the Railroad Company was acquiring these lands pursuant to the provisions of the act of 1864 and the Joint Resolutions of 1870, as is demonstrated by our discussion of the Company's Place List No. 36 and the patent.

That the Supreme Court of the United States did not agree with this assertion, advanced by counsel for the Railway Company, is illustrated by the statement from the

United States vs. N. P. Ry. Co., supra, 311 U. S. 317, to the effect that the proviso required the Company to open the lands to preemption and settlement at the expiration of five years after the completion of the entire line whether the lands were then subject to the mortgage or not. The complete quotation to which we refer is set forth on page 26 of our original brief.

Heath vs. N. P. Ry. Co., 38 Land Decisions 77, cited at page 67 of the Railway Company's brief is not persuasive authority; as admitted by counsel for the Railway Company, the First Assistant Secretary of the Interior affirmed the action of the General Land Office in rejecting Heath's homestead application upon the grounds that the Interior Department was without jurisdiction. This holding was obviously correct without reference to the mortgage foreclosure procedure. See Oregon & C. R. Co. vs. U. S., supra, 238 U. S. 393, from which we previously quoted to the effect that by the provision in the land grant act withdrawing from sale the granted lands, the lands were comitted to a power other than the government to be administered for the purposes of the Act and were withdrawn from the operation of the land laws. This is the basis of Heath vs. N. P. Ry. Co., and while the First Assistant Secretary of the Interior may have intimated that the sale under the foreclosure proceedings operated as a disposal of the lands within the meaning of the Joint Resolution, the case is not authority for any such proposition.

The position of counsel for the Railway Company is also refuted by one of the very cases which they cited in their brief. On pages 69 and 70 of their brief, they quote from the Forest Reserve Case, 41 S. Ct. 439, 256 U. S. 51, 65 L. Ed. 825, as follows:

> "The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the Joint Resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights *and obligations* of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other." (41 S. Ct. 439). (Emphasis supplied).

Under this decision it is clear that the Resolution of 1870 is equally as effective now as it was before the foreclosure.

II. ESTOPPEL, LACHES, AND STATUTES OF LIMITATIONS

As we anticipated in our original brief, counsel for the appellee Railway Company have advanced, commencing at page 70 of their brief, arguments based upon the doctrines of estoppel and laches and upon the various statutes of limitations. They have, however, made no attempt whatsoever to answer nor even mentioned the holding which we there set forth from Ore. & C. R. Co. vs. U. S., supra, 238 U. S. 293, as follows:

"We may observe that the Acts of Congress are laws as well as grants, and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the Railroad Company based on waiver, acquiescence and estoppel and even to the defenses of laches and the Stataute of Limitations."

In view of the fact that counsel for the appellee Railway Company have made no attempt to answer this statement by the Supreme Court of the United States as applied to this case, we can only assume that they have no answer and we again submit that this statement is a complete answer to their arguments based upon estoppel, laches, and the various statutes of limitations.

CONCLUSION

On the basis of the foregoing arguments and authorities and those set forth in our original brief, we again submit that the court below was clearly in error in finding as a matter of law that the mineral reservation of the Northern Pacific Railway Company in the deed to the predecessor of plaintiff and appellant was valid.

REPLY AND ANSWER TO THE BRIEF OF APPELLEE AND CROSS-APPELLANT, THE TEXAS COMPANY

The following portion of this brief is in reply to the brief of The Texas Company in answer to our original brief on file herein and in answer to that portion of The Texas Company's brief which relates to The Texas Company's cross-appeal from that portion of the judgment granting to the plaintiff Russell the sum of thirty-six hundred dollars on a contract between plaintiff Russell and The Texas Company.

FIRST ISSUE

Compensation Due Mr. Russell for the Use, by The Texas Company, of the Land in Section 23, Township 17 North, Range 53 East, Dawson County, Montana.

With respect to our contention that the value for oil well drilling purposes of the lands used by The Texas Company should be considered, counsel for The Texas Company rely principally upon Federal Cases involving condemnation for dam sites. Such cases are clearly distinguishable from the present case in that the only authority that has or could have the right to construct a dam across a navigable river was and is the United States. In other words, the value involved in those cases is one that could never apply to any private person or corporation except by grant from the government. This is not true of the value for oil well drilling purposes involved in the present situation. It is true that if the Northern Pacific Reservation be valid,

the defendant The Texas Company, has the right to take the surface of plaintiff Russell's land for this purpose. But that right is accompanied with the obligation to pay to Mr. Russell the market value thereof and in determining the market value, the fact that plaintiff can not stop The Texas Company from taking the surface must not be considered, and the case must be determined as if defendant, The Texas Company, was a willing purchaser who would not have to buy, and the plaintiff Russell, a willing seller, not obligated to sell. In such situations, the value of the surface for oil well drilling sites would certainly be considered. See the authorities cited in our original brief, particularly Yellowstone Park Railroad Company vs. Bridger Coal Company, 34 Mont. 545, 87 Pac. (2d) 963.

A case more nearly analogous to this one than those cited by counsel for The Texas Company is the case of Mississippi Run River Boom Company vs. Patterson, 98 U. S. 403, 25 L. Ed. 206; which case involved a situation wherein a company which had been granted a franchise by the State of Minnesota to construct logging booms on the Mississippi River was condemning for that purpose an island owned by one Patterson. In that case the Supreme Court of the United States said:

> "The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty million feet of logs, added largely to the value of the lands. The Boom

Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. * * *

"The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value, find support in the several cases cited by counsel. Thus, in the matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the City of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was 'What is the value of the property for the most advantageous uses to which it may be applied?' In Goodwin v. Canal Co., 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in Young v. Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities.

but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. *Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner."* (Emphasis supplied).

On the basis of this case and of the cases cited in our original brief, we again submit that the value of these lands for oil well drilling purposes should have been considered.

With reference to the opinion of the witness Morton and the foundation which was laid therefor, we have no quarrel with the authorities cited by the counsel for The Texas Company, but we must insist that the facts upon which Morton's testimony were based were adequately presented. These facts were the production record of the wells on plaintiff's lands (Pl. Ex. 10), and the fact that only the surface was owned by the plaintiff Russell and that only the surface was being valued. From these two facts, based upon his experience in the oil business, Mr. Morton could, under the authorities cited by counsel for The Texas Company, properly testify as to the value of the area taken for oil well drrilling purposes. In regard to the fact that his testimony was not specifically directed to the time when mining activities were commenced, it is our contention that the production record of these three wells is certainly some evidence of the expectations which would have governed the market value at that time. This record is, of course, the realization of those expectations. Furthermore, the three wells on Mr. Russell's lands were not all

drilled at one and the same time. The dates when they were drilled and the dates when operating for drilling them commenced are before this Court in the admissions and answers to inerrogatories (R. 94), and at the time drilling operations were commenced on the lands taken for the second well and the third well, the productivity of the area had, of course, been established by the first well. For all these reasons, we respectfully submit that the testimony of Mr. Morton is of value in arriving at the market value of the surface taken by the defendant, The Texas Company.

SECOND ISSUE

Right to the Use of Surface Water on Section 23.

As anticipated in our original brief, counsel for The Texas Company now argue that the water used by them from the plaintiff's Section 23 was owned by them. This contention now advanced by counsel for The Texas Company can not be considered for three reasons: First: It constitutes a variance from their pleading. Second: The waters involved were surface waters not subject to appropriation. Third: The Texas Company was without right to make an appropriation upon the plaintiff's land.

It is the general rule in Montana, as elsewhere, that parties to an action are bound by their pleadings and can not controvert their averments; allegations, statements, or admissions contained in a pleading are conclusive against the pleader as proof of the facts which they admit. Gilna vs.

Barker, 78 Mont. 357, 254 Pac. 174. Andersen vs. Mace, 99 Mont. 421, 45 Pac. (2d) 771. In Paragraph IV of the plaintiff's third causes of action on page 9 of the plaintiff's complaint (Rr. 13-14) it is alleged that the defendants have since, on or about the third day of September, 1952, taken and removed water from the plaintiff's lands for uses upon other lands and that the taking and removing of said water for use upon other lands is without right or authority and is a wrongful invasion of the rights of the plaintiff and a continuing trespass upon the lands of the plaintiff. In paragraph IV of their answer to the third cause of action in plaintiff's complaint, the defendant Texas Company admits as follows:

> "* * * admit the use of said roads, *water,* and rock for access to and use upon adjacent lands was wrongful; * * *." (R. 35).

In the face of the admission and allegation above set forth we fail to see how The Texas Company can now contend that its use of water from plaintiff's Section 23 was rightful. Counsel for The Texas Company may argue that this admission, being an admission that the use of the water on lands other than Section 23 was wrongful does not preclude them from asserting that the use upon Section 23 was rightful. However, as they themselves suggest at a later point in their brief, to which reference will be made, if they owned the water by right of appropriation, they would have the right to use it at any place they might see fit, so far as Mr. Russell was concerned. Consequently,

it is clear that this admission not only precludes them from argument that the use of the water on land other than Section 23 was within their right, but also precludes them from advanacing this argument as to the use of the water on Section 23.

The claim of right advanced by counsel for Texas Company is based upon the theory that the water was water subject to appropriation, that they were rightfully upon the land and therefore had the right to appropriate it. The waters used by The Texas Company were surface waters. This fact they may not now deny. See admissions and allegations contained in Paragraph IV of The Texas Company's answer to the third cause of action in plaintiff's complaint (R. 35), wherein they admit and allege that they "used surface water" from said lands. Section 89-801 R. C. M. 1947, provides as follows:

> "The right to the use of unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."

See the recent case of Doney vs. Beatty, 124 Mont. 41, 220 Pac. (2d) 77, holding that surface waters are not subject to appropriation. The rule has long been that surface waters are the absolute property of the land owner so long as they remain upon his land and under his control. This being so, plaintiff Mr. Russell, could impound the waters,

use them to irrigate crops, sell them or simply pay no attention to them. See Kinney on Irrigation and Water Rights, Vol. 1, Second Edition, Section 318, pages 516-519.

The right of The Texas Company in this case under the reservation of the defendant Northern Pacific Railroad Company, assuming that reservation to be valid, is only to the use of so much of the surface of plaintiff's land as may be necessary for their drilling operations subject to their obligation to pay to Mr. Russell the market value of the surface which they used. If these surface waters be considered a part of the surface, The Texas Company became obligated under the reservation to pay the reasonable value thereof. If they be considered property of the plaintiff, separate and apart from the surface of the land, The Texas Company, by its use of the water, is nonetheless obligated to pay the reasonable market value thereof.

Furthermore, even if this water be considered subject to appropriation by The Texas Company, which it can not in view of The Texas Company's admissions, The Texas Company's only right on the land of the plaintiff, assuming that it has any right, is for the purpose of searching for and recovering oil and gas and other minerals. There is no right reserved and there has been none granted to go upon the lands of the plaintiff for the purpose of making an appropriation of water. The only legitimate use which can be made of the reservation upon which The Texas Company relies is to search for and recover such oil and gas and

other minerals. See 3 Lindley on Mines, Section 813, Page 2006, 28 C. J. S. Easements, Section 92; 58 C. J. S. Mines and Minerals, Section 159. In this respect, we again respectfully submit that the case of Prentice vs. McKay, 38 Mont. 114, 117, 98 Pac. 1081, is controlling and the case of Connally vs. Harrel, 102 Mont. 295, 57 Pac. (2d) 781, cited by counsel for The Texas Company at page 23 of their brief, is not authority to the contrary. In the Connolly case there was a license to go upon the lands involved for the specific purpose of appropriating water. The licensee, therefore, having the right to make a valid appropriation. The Connolly Case, while distinguishing the rule of Prentice vs. McKay, specifically recognizes that rule to the effect that one cannot make valid appropriations of water upon the lands of another without some right to be there for the purpose of making said appropriation.

THIRD ISSUE

Cross-Appeal by The Texas Company.

The Texas Company has appealed from that portion of the judgment awarding the plaintiff Russell the sum of $3600.00 under a contract. The Texas Company's arguments in support of that appeal commence at page 25 of the brief of the appellee and cross-appellant The Texas Co. This portion of our brief is in answer to the arguments there set forth.

The statement set forth by counsel for the cross-appellant The Texas Company as to the facts concerning which there is no dispute, pages 25, 26 and 27 of The Texas Company's brief, is not entirely accurate. Counsel for The Texas Company state that on or about the 17th day of April The Texas Company constructed a dam creating a reservoir on the plaintiff's land in which it gathered and impounded surface water coming down the hill from Section 26 and used about 15,000 barrels of that water for drilling operations in Section 22 between September 14, 1952, and November 12, 1952. They state that no water was ever taken from Section 23 for use on either Section 23 or Section 22 or any other land, citing the court to page 74 of the Transcript which is defendant's answer to interrogatories. The answers to the interrogatories to which they direct the attention of the Court do not state that no water was taken from Section 23 for use on either Section 22 or on any other land. They state that the defendant constructed a dam in the SW¼ of the SW¼ of Section 23 into which drained the runoff of free surface waters coming downhill from Section 26; that the defendant pumped about 15,000 barrels of that water from the dam on Section 23 for use in drilling on Section 22 between September 14, 1952, and November 12, 1952. They then state "no *other* water was taken from Section 23." Now, of course, whether this water originated in Section 26 or some other section it was on Section 23 when impounded by the defendant The Texas Company and it was from Section 23 that it was taken. Furthermore,

at least a portion of this water originated on Section 23. See the testimony of Bert Ekland (R. 224).

Counsel for cross-appellant The Texas Company refer at page 26 of their brief to the letter from Vaughn, Brandlin & Wehrle upon which letter Mr. Russell bases his claim of contract. They then state that this letter was not answered until The Texas Company wrote to Mr. Russell's attorney under date of December 16, 1952, refusing to consider the offer made by Mr. Russell. It should be pointed out that this letter of refusal, dated December 16, 1952, actually was not mailed to Mr. Russell until December 26, 1952, which date is the date postmarked on the letter (R. 85). Long prior to this time and on November 22, 1952, as stated by counsel for cross-appellant The Texas Company at page 27 of their brief, The Texas Company had ceased to make use of Mr. Russell's land in connection with their operations upon other lands. At this point we might remark that we do not see any valid criticism of Finding of Fact No. XIV there criticized by counsel for cross-appellant. That Finding is precisely correct for the cross-appellant did continue to use the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands from and after the 30th day of October, 1952, and they did stop all such use on November 22, 1952, and not before although the use of rock and the use of water was terminated on different dates during the interim.

It is contended by cross-appellant The Texas Company that the continued use of the roadways from Section 23 and the water produced and impounded on Section 23 on adjacent sections after October 30, 1952, constituted no consideration whatever for the alleged promise by The Texas Company to pay Russell $150.00 per day for such use. We need not go outside the brief of cross-appellant for our answer to the arguments presented in support of this contention. Each of those arguments contains within itself the seeds of its own destruction. This is particularly true of the various authorities cited by counsel for the cross-appellant.

First, counsel for the cross-appellant suggest in support of this contention that because Russell was granted judgment against the company for the "full market value" of 23.67 acres of section 23 used by The Texas Company there is no consideration. Now, in the first place, The Texas Company admitted and has never denied that this use of plaintiff's property in connection with its operations upon other lands was wrongful and not justified under the reservation which they claim to be the basis of their right (R. 33-34). If The Texas Company had any right at all on the lands of the plaintiff it was only in connection with their operations upon those lands. Consequently, their use in connection with their operations upon other lands would properly have been the subject of bargaining between The Texas Company and Mr. Russell and such use without agreement from Mr. Russell rendered The Texas Com-

pany common trespassers. Insofar as the payment of the full market value for the 23.67 acres is concerned it is conceded that utility of the 23.67 acres to Mr. Russell was completely destroyed. Consequently, Mr. Russell was clearly entitled to that compensation and as previously noted The Texas Company has admitted that he was entitled to compensation as well for the use of his property in connection with The Texas Company's operations upon other property.

Insofar as the argument advanced by The Texas Company that the water impounded on Section 23 belonged to The Texas Company and could be used at any place or location is concerned, that argument now advanced is completely at variance with the admissions contained in their pleading, previously pointed out, wherein The Texas Company specifically "admits the use of said road, water and rock for access to and use upon adjacent lands was wrongful." (R. 35). In the face of this admission The Texas Company may not now argue that the water was theirs to use where they saw fit.

Counsel for cross-appellant The Texas Company next point out the fact that Section 23 was under lease to Mr. Ekland and they therefore argue that Mr. Russell had no power to make the contract. As counsel for the cross-appellant themselves point out later on, this lease to Mr. Ekland was a grazing lease and Mr. Ekland having leased only the grazing rights would be in no position to complain concerning the contract. At any rate Mr. Ekland is not here complaining and there is no showing as to the

terms of his lease other than that it was a grazing lease. Mr. Russell made an offer to The Texas Company. The Texas Compaany accepted that offer in conformity with the mode of acceptance specified in the offer and there is no issue as to the rights of Mr. Ekland.

Counsel for The Texas Company continually refer to the contract as an unconscionable contract. Now, if there were any unconscionable conduct involved in this case it certainly was not the conduct of Mr. Russell. The letter containing the offer to The Texas Company was dated October 28, 1952, and should have been received by The Texas Company in due course not later than the 30th day of October, 1952, and here we might remark that The Texas Company does not anywhere in their pleadings, or otherwise, dispute that they did so receive the letter. Thereafter, according to their own admissions, they continued the use, which they admit was wrongful, insofar as the water was concerned until November 12, 1952, and insofar as the roads are concerned until November 22, 1952. This, without answering in any fashion Mr. Russell's letter. Bob Traver, a witness for the defendant The Texas Company, testified that immediately after they received notice to stop using the roads they commenced building a new road and that it took just three or four days for them to build the new road (R. 216-217), that the order to stop using the road was from the company (R. 219), that the road was finished in November when they stopped using the road on Mr. Russell's land (R. 220). In other words, for a period of twenty to twenty-one days after receipt of the letter de-

dendant The Texas Company continued the wrongful use and they now contend, with no intention whatsoever to accept Mr. Russell's offer, without even attempting to make arrangements to avoid such wrongful use. We might further point out that it was not until December 26 thereafter that The Texas Company finally communicated to Mr. Russell that they did not intend to accept or that they refused to consider the offer made by Mr. Russell. In other words, by their pleadings and by their testimony they admit a willful trespass and continuation of that willful trespass, after notice, with no attempt, for a period of twenty to twenty-one days at east, to comply with such notice and with no notification that the offer made with the notice would not be considered and no communication whatsoever with Mr. Russell until more than a month subsequent to the discontinuance of their willful trespass. Now, we ask the Court if anyone here is guilty of unconscionable conduct is it The Texas Company or is it Mr. Russell? We are confident that this Court will have no difficulty in answering that question.

Insofar as the point pointed out by counsel for the cross-appellant The Texas Company that the plaintiff in the complaint asked for an injunction we need only call this Court's attention to the fact that the license offered was a revocable license. It would seem to make no difference as to how Mr. Russell chose to revoke that license.

Commencing with page 31 of the brief, counsel for the cross-appellant, The Texas Company, present a considera-

tion of the various authorities which they believe support their position. At that point they state that we rely solely on the provisions of Section 13-320 R. C. M., 1947. In this statement they are incorrect. Not only did we cite to the Court in addition Section 13-325 R. C. M., 1947, but furthermore, as we will show, the authorities generally, including those cited and quoted from by counsel for the cross-appellant support our position. Counsel for the cross-appellant first consider Section 13-317 R. C. M., 1947, specifying that consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it or which necessarily tends to such communication. The last phrase in this statute clearly implies that actual intention is not essential. The intention of the cross-appellant is important only as it is manifested.

On page 32 of their brief, counsel for the cross-appellant cite and quote Section 55 of the Restatement of the Law of Contracts, which seems to support their position. However, they then proceed to quote at some length from the Montana Annotation to that Section of the Restatement. Considering that quotation, we find therein authoritative support for our position.

> "No case found. The rule *accords* with the language of cases involving bilateral contract which say that there must be mutual assent to form a contract, or that the parties must give their free and voluntary assent to the terms. (Citing cases). But in accord with Sections 20 and 23 of the Restatement, J. Neils Lumber

> Co. v. Farmers' Lumber Co., supra, indicates that, despite the statement made to the contrary, in a bilateral contract *it is not necessary that the party intend to accept an offer provided he has manifested an intention to accept.* Section 55 in reality therefore lays down an additional requirement of accepting the offer. Since an act is equivocal it seems reasonable to require proof of intent." (Emphasis supplied).

In this particular case, the actions of the cross-appellant clearly manifest an intention to accept. The mode of acceptance was specified in the offer. Had the cross-appellant merely remained silent, we agree that no contract would have been formed. However, the mode of acceptance set forth in the offer calls for affirmative action on the part of cross-appellant and cross-appellant does not deny that affirmative action in accord with the offer was taken.

Counsel for cross-appellant cite and quote at length Section 72 of the Restatement of Contracts. Here also we find support for our position. Of course, that section of the Restatement is not precisely applicable since it deals with situations involving silence and *inaction* on the part of the offeree. Whereas in the present case, we are relying upon silence and affirmative action. The first example set forth in Section 72 as illustrative of situations wherein silence and inaction on the part of the offeree constitute an acceptance of the offer, is as follows:

> "(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a

reasonable man that they were offered with the expectation of compensation."

Certainly in this case the cross-appellant had a reasonable opportunity to reject the offered license. Instead of so doing, cross-appellant did that very thing which the offeror, Mr. Russell, had stated would constitute an acceptance.

Counsel for the cross-appellant rely upon Williston On Contracts Revised Edition. They cite and quote from Section 64. Section 67, Section 91, and Sections 91B and C. In connection with Section 67, an example is set forth in support of the proposition that the performance of an act requested by the offeror does not necessarily indicate assent to the offer. We agree that in the situation there set forth performance of the act is no indication of assent, but obviously the example has no relation to the facts here presented. In the example, the offeree confers a benefit upon the offeror instead of accepting a benefit from the offeror. Changing the example somewhat so that it more nearly approximates the facts here involved, let us suppose that the offeror, instead of offering a reward to the finder of the watch, offered to pay someone to search for the watch. Surely even counsel for the cross-appellant would not argue that acceptance of the pay by the offeree did not constitute an acceptance by the offeree of the proposition. At another point in this very valuable work, we find the following statement:

"Since, however, the formation of such contracts depends not upon an actual meeting of the minds, but

merely upon manifestions of assent. It is not true that an intention to accept is of any importance except where the actions or words of the offeree are ambiguous." Williston on Contracts, Revised Edition, Volume 1, Section 166.

In this case there was nothing ambigous in the action of the cross-appellant. Its conduct clearly met the terms of the offer and constituted an acceptance thereof. The sections from Williston on Contracts cited by counsel for cross-appellant to the effect that mere silence does not constitute an acceptance of the offer are correct. However, these authorities have no application in this case because in addition to mere silence on the part of cross-appellant, the record shows there was affirmative action on its part in continuing the use of Mr. Russell's land in connection with its operations on adjacent lands. Cross-appellant had no right to use Section 23 belonging to Mr. Russell in connection with operations on adjacent lands. The right to grant permission to use Section 23 in connection with operations on adjacent lands rested exclusively with Mr. Russell and he could grant that right upon any terms he desired. The offer of the right made to the cross-appellant included the stipulation that the continued use of Mr. Russell's Section 23 in connection with operations on adjacent lands would be taken as an acceptance of the offer and the cross-appellant continued in its use of Section 23 in connection with its operations on adjacent lands.

Counsel for the cross-appellant acknowledged that Mr Russell might bring action (ex contractu) for the reason

ble value of the use of his property, but they argued that ie may not convert the use into an express contract calling or a daily rate of payment of his own choosing, which sum night as well have been fifteen thousand dollars a day as one hundred fifty dollars a day. To be sure the sum might s well have been fifteen thousand dollars a day as one undred fifty dollars a day, but there was no coercion mployed which would have forced the cross-appellant to ontinue their wrongful use of plaintiff's land. That was a natter of free choice on cross-appellant's part. Suppose hat an offeror proposes to an offeree that he rent to the fferee an apartment at a rental of one hundred fifty ollars a month. Suppose further that he makes this offer y letter as was done in this case, informs the offeree as o the location of the apartment and the key thereto and ells him that if he accepts he may move right in. Suppose nen the offeree, without communicating with the offeror, noves into the apartment and lives there for a month. urely counsel for the cross-appellant could not agree that t the end of the month the offeree could remove himself om the apartment, inform the offeror that he considered ne hundred fifty dollars per month unconscionable and ould pay him only the reasonable rental value of the partment. Such is precisely the argument now advanced y counsel for the cross-appellant. When a fruit vendor laces a box of oranges on the street with a sign thereon ecifying the price for each orange—that is an offer to the

general public. Surely counsel for the cross-appellant cannot agree that when I take one of those oranges I am not bound to pay the price stipulated, but only the reasonable value of the orange.

We think it is unnecessary to argue the point as to whether or not Mr. Russell was unreasonable in stipulating as his price for the license the sum of one hundred fifty dollars per day. Cross-appellant could not have considered it too unreasonable at the time for as previously pointed out, it continued the wrongful use for a period of twenty-one days after receiving the letter containing the offer, without taking any steps to cease and desist from such wrongful use. I cannot take the fruit vendor's orange knowing that such action led him to believe that I accepted his offer and rely in my mind upon an intention, not expressed, to pay him only the reasonable value therefor. The examples which we have set forth may be ridiculed by counsel for the cross-appellant as far-fetched, but we sumbit the situation here presented reduced to its simplest terms, is on all fours with these examples.

Counsel for the cross-appellant cite two California cases which they conceive to be applicable here. Analysis reveals that both of those cases are clearly distinguishable. In the first case, Wright v. Sonoma County, 156 Cal. 475, 105 Pac. 409, was the situation wherein there was no offer whatsoever; there was never any assent on the part of the plaintiff in that case to the use by the defendant. The notice given

he plaintiff expressly forbade such use and stated that ase the notice was disregarded, the plaintiff and his co- ers hereby demand fifty dollars per day for each and y day of such use in violation of the notice as compen- on for the use. As stated by the Court in that case, this and can not be considered a proposition to allow such at that rate. It amounted to no more than a notice of amount of damage that the plaintiff and his co-owners ld demand for the use without their consent. In this , there was a specific and definite offer.

he second case cited by counsel for the cross-appellant: man v. Assoc. Tel. Co., Ltd., 100 Cal. App. (2d) 806, Pac. (2d) 846, also involved a situation wherein there no offer on the part of the plaintiff. The plaintiff merely med the defendant that unless the encroachment in- ed in that case were removed within three days after notice, the plaintiff would charge defendant twenty- dollars per day for each day thereafter that the en- chment continued.

summarize our arguments, this is a situation wherein is more than mere silence or failure to reject the offer. e was that which is required by Section 13-320, R. C. 1947, i. e., acceptance of the consideration offered with proposal.

ounsel for The Texas Company have pointed out that built by-pass roads after receipt of the letter. We fail

to see how The Texas Company could relieve itself by proceeding in such fashion. The Texas Company was making use of the lands of the plaintiff for a purpose which they admit was wrongful. The plaintiff demanded that such use cease and in the same letter offered them a revocable license to continue such use at a stated consideration specifying that continuation of the use by The Texas Company would be deemed an acceptance of the offer. The Texas Company now argues that they could, after receipt of this demand and offer, in their own good time make other arrangements satisfactory to themselves and then say to the plaintiff—your offer is refused, come ahead and see how much damage you can prove. This argument merits the respectful consideration of a Jesse James or John Dillinger, but it is hardly the sort of an argument calculated to appeal to a Court of Justice, and we submit that the local Court's judgment in so far as it recognizes the formation of this contract by Mr. Russell and The Texas Company must be affirmed.

CONCLUSION

On the basis of the foregoing arguments and authorities and the arguments and authorities set forth in our original brief, we again submit that the appellant was entitled to recovery against The Texas Company for the use of his lands, and water and materials from his lands, in connection with The Texas Company's operations upon adjacent lands

prior to the offer of the revocable license. We further submit that the lower Court clearly erred in allowing to the plaintiff only the sum of ten dollars per acre for plaintiff's lands utilized by The Texas Company.

Respectfully submitted,

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